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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1060

WESTERN GILLETTE, INC.,
Petitioner,

v.

OLIVER I. SABALA, Individually and on behalf of all others similarly situated, and LEONARD M. RAMIREZ,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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Bowne of Houston, Inc. Printed in U.S.A.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 516 F.2d 1251, and is reproduced in the Appendix to the Petition for Certiorari (App. pp. A-1-44).

The Opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 362 F.Supp. 1142; and the Remedial Order is reported at 371 F.Supp. 385. Both are reproduced in the Appendix (App. pp. 47-98).

JURISDICTION

Respondents do not question the jurisdiction of this Court as set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are, as set forth in the Petition, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*

QUESTIONS PRESENTED

1

The questions presented by Petitioner are as follows:

Whether unlawful standards were used in the formulation of the "rightful place" seniority awarded the discriminatees for the purpose of remedial relief.

2

Whether the priority granted discriminatees as to future over-the-road jobs constitutes proscribed discrimination.

3

Whether the standards used to fix rights of discriminatees to back pay permit awards to individuals not legally entitled thereto.

4

Whether a legally invalid formula has been used to compute the award of back pay recoverable by discriminatees.

STATEMENT OF THE CASE

Petitioner's statement is in disregard of the operative principle of review that the evidence is to be viewed and construed in a manner favorable to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below.

The trial court heard abundant testimony regarding the factual underpinnings of its Opinions and held, *inter alia*, that petitioner was primarily responsible for the original hiring discrimination, and accordingly assessed all back pay liability against petitioner. The trial court's assessment of responsibility was bottomed upon its review of twenty-five sworn answers to interrogatories propounded and filed by petitioner, exhaustive examination of respondents' expert[1] and petitioner's two experts,[2] review of evidence documenting petitioner's subjectivity in awarding preferred over-the-road positions,[3] testimony taken, and, perhaps most importantly, statistical evidence supporting presumptions and conclusions of the court that there existed "original hire" and "lock-in" discrimination at Western Gillette, Inc.[4]

Nowhere, as Petitioner asserts, is there any evidence that "[T]he Court of Appeals *mistakenly* concluded that the district court had found the Southern Conference Area was

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1. Dr. Tapia.

2. Drs. Otto and Lawless.

3. Respondents' assertions throughout trial was that if in fact, any of them became road drivers, petitioner would use the "thirty day probationary rule" to fire them – that is that during the first thirty days as an over-the-road driver, one could be fired with or without cause. Petitioner vehemently denied this; Plaintiff's exhibit 4 at Par 4, p. 1264 of the Appendix to the Record, belies their denial.

4. Petition for Certiorari, pp. A-64-67.

the 'universe of job opportunities' for the purpose of fixing 'carry-over' constructive seniority because of 'modified seniority system' provisions in the applicable Road Driver bargaining agreements"[5] (emphasis added). In fact, footnote 12 of the Petition for Certiorari alludes to *no* supporting evidence or law in support of this assertion which is one of the touchstones of the Petition;[6] petitioner's bare assertions are simply untrue.[7]

Petitioner complains that back-pay was improperly computed. The Circuit Court had before it the Record, ignored by petitioner, and it properly concluded, as it had previously, that there is no unique formula by which back-pay can be computed.[8] The trial court's method for computation was appropriate to the circumstances and facts of the case. The formula for computation was one, as petitioner indicates, selected by the Court as the best suited to remedy the wrong from among a varity of formulae advanced by both petitioner and respondents. The Circuit Court correctly chose not to invade the proper province of the trial court to determine what was fair, just and equitable under the circumstances.

Petitioner misconstrues the trial court's decisions when it suggests that the awards of "make-whole" seniority were made without regard to the facts. In fact, the seniority awards were predicated in large part upon the answers to interrogatories filed by Petitioner. Based upon those answers and upon testimony taken at trial, the court excluded two class members, Messrs. Ellison and

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5. Petition for Certiorari, p. 9.

6. Petition for Certiorari, p. 9, n. 12, pp. 9-10.

7. Petition for Certiorari, pp. A-88-89.

8. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

Golden[9]; other putative class members were excluded by virtue of their answers to the interrogatories propounded by petitioner.

Finally by allusion, petitioner suggests that the seniority relief granted constitutes proscribed "reverse discrimination". The petitioner attempts by this allusion, and more directly in argument, to raise questions before this Court that were not before the court from which this writ is taken.

REASONS FOR DENYING THE WRIT

1

The District Court did not utilize unlawful standards in the formulation of "rightful place" seniority.

It is now well settled that federal courts dealing in the area of employment discrimination are mandated, upon a showing of liability, to "fashion such relief as the particular circumstances of the case may require to effect restitution, making whole insofar as possible the victims of racial discrimination . . .". *Franks v. Bowman Transportation Co.*, 424 U.S. 747, ; 47 L.Ed.2d 444, 461 (1976). It is equally well established that a seniority remedy is an integral part of the "make whole" purpose of Title VII; and, as this Court has recognized, "adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that he would have had . . . [but for discrimination . . .]". Id at 461-462

9. Petition for Certiorari, pp. A-84-85. Note also that Mr. Pinkins achieved no rightful place seniority because there had been no road jobs available in Houston since the date he had become qualified.

Nor can it be denied that the shaping of an appropriate remedy is within the sound discretion of the district court whose judgment must be guided "by sound legal principles". *Albemarle Paper Company v. Moody,* 422 U.S. 405, 416 (1975).

Under these broad guidelines, the petitioner's challenges to the district court's calculation of "rightful place" seniority are wholly unfounded. Here, the petitioner's attack is basically two pronged. First, they contend that the district court erred in determining when the "discrimination began"; and, second, the district court incorrectly determined the "road jobs which would have been available to class members" (Petition For Certiorari, p. 16). In so doing, petitioner has alleged that the district court's calculation of "rightful place" seniority is squarely in conflict with this court's decision in *Franks* and *Abermarle.* Nothing could be further from the truth. "Rightful place" seniority dates have consistently been interpreted by the lower courts as embodying two concepts. First, the date upon which the employee became qualified for the job in question; and, second, the next date after qualification upon which a job became available to which the discriminatee would have acceeded "but for" the discrimination. See, e.g., *Sagers v. Yellow Freight System,* 529 F.2d 721 (5th Cir. 1976). After twenty-two days of bifurcated trial, during which the district court heard testimony from thirty-three witnesses including seven officers or employees of the company, the court carefully determined each individual class member's qualifications date and their "rightful place" seniority dates (See, n.9, *supra*).

Yet the petitioner asserts that the district court engaged in a presumption that all class members would have taken the first job available to them after their qualification date. The petitioner's statement that the district court engaged

in this "presumption" (Petitioner for Certiorari p. 17) is simply not supported by the record and is misleading to this Court. What is true, is that the district court, based upon sworn answers to interrogatires by each class member and trial testimony, determined *which* of the class members would have taken the first available road job after they became qualified. Thus, this determination was not a presumption at all, but a conclusion reached by the district court which was supported by the evidence.[10] These putative class members who the court concluded would not have accepted the jobs were excluded from the class.

Additionally, the petitioner alleges that the district court erred in determining that the class members could have obtained road jobs elsewhere than the Houston terminal. Considering the record in this case, this argument is specious. The touchstone for fashioning any remedy, in a case such as this, is a determination by the court as to what the universe of job opportunities is for the class discriminatees. Of course, this determination must be based on the record. Here, the record defies petitioner's assertions and overwhelmingly supports the district court's conclusion that, for those who would have taken them, road driving jobs in the Southern Conference would have been available to them but for the proscribed discrimination.[11] (R. 1117-1119, 1597, 1719-1920). On this

10. Many of the class members qualification dates were stipulated to by petitioner in open court. Those whose qualification dates were not the subject of stipulation were determined by the court after hearing the testimony of Robert Hoover, the company employee charged with administering the company's road driving tests. Tr. II, R. 1052-1055. [For the Court's convenience, all references to the record of the first trial, which was the liability trial, shall be denominated by Tr. I., and the second trial, which was the remedy trial, as Tr. II]

11. Of course, the modified system seniority was another factor considered by the district court in making this determination. (Petition for Certiorari, p. A-89).

basis, it cannot be gainsaid that the district court fulfilled its obligation to fashion a decree which would, as far as possible, place the injured party "as near as may be, in the situation he would have occupied if the wrong had not been committed". *Wicker v. Hoppock*, 6 Wall 94, 99. Quite simply, the evidence supports the remedy.

Finally, Petitioner asserts that this Court should grant certiorari because the district court failed to consider, in computing "rightful place" seniority, the impact it might have on non-minority drivers who have transferred to the road.[12] However, this issue was not raised on appeal and, accordingly was not considered by the Fifth Circuit.[13] For this reason, Respondents submit that certiorari should not be granted on this issue. See, e.g. *Franks*, *supra*, n.38.

2

The "make-whole" seniority relief granted some class members does not constitute "reverse discrimination".

As to the ten class members who testified that they would have taken jobs anywhere in the Southern Conference, Petitioner concedes that there "may be some justification" for the seniority relief granted.[14] However, Petitioner vigorously challenges the court's authority to afford job opportunities in the Southern Conference to those discriminatees who had indicated that they were interested only in Houston based over-the-road jobs.

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12. Petition for Certiorari, p. 20. Petitioner also alleges that there is a conflict in the circuits on this issue. While Respondents do not believe that an irreconcilable conflict exists between the circuits; we would submit that this contention was resolved by this court's opinion in *Franks*, *supra*.

13. Petition for Certiorari, pp. A-1-44.

14. Petition for Certiorari, p. 24.

Testimony at trial indicated that there was little likelihood that there would be any jobs available in Houston in the foreseeable future.[15] Consistent with his mandate, the trial court fashioned a remedy calculated to "make whole" so far as possible, the victims of impermissible racial discrimination. Only by affording all entitled class discriminatees an over-the-road job opportunity could the court meet its mandate. In the truest sense, the relief granted the Houston discriminatees was consistent with the circumstances of the business at the time. Employees at Houston were and are on layoff; road drivers on layoff are entitled to "bump" into any other of petitioner's Southern Conference terminals under the "modified system seniority", displacing road drivers with lesser seniority at the transferee terminal. There was no way to take a "Houston only" view of the matters presented to the court and counsel for petitioner recognized this. Discussing the materiality of evidence relating to minority employees elsewhere in the petitioner's system, counsel for petitioner made the following statement to the court:

> Mr. Russell: There are several reasons why *I believe it is material and pertinent,* Your Honor, first of all, in the narrow area, *because we are involved with the modified seniority system.*
>
> *It is impossible to isolate this problem,* even as of this class, *to Houston,* in our judgment, in its turn. (emphasis supplied).[16]

Respondents urge that the trial court's grant and the circuit court's affirmance of "Rightful Place" seniority to

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15. Tr. I. R. 961-964. As a matter of fact, the over-the-road operation at Houston was eliminated subsequent to the Circuit Court's opinion.

16. Tr. I R. 513.

both the Houston and Southern Conference discriminatees is wholly consistent with this Courts pronouncements regarding remedies.[17]

If the red herring of "reverse discrimination" is not wholly dispelled by the majority opinion in *Franks, supra,* the proper approach to dealing with the conflicting interests of encumbent employees is set out in Mr. Justice Burger's concurring and dissenting opinion.[18] *Franks, supra* at 471. Also see *McDonald v. Santa Fe Transportation Company* U.S. , 12 FEP Cases 1577 (1976).

3

The Eligibility of Class Plaintiffs For Back Pay Has Not Been Determined On the Basis of Invalid Standards

As framed, Petitioner's question No. 2 makes statements which are not supported by the record. In attempting to convince this Court that certiorari should be granted on this issue, Petitioner points to decisions of the fourth and sixth circuits[19] as being directly in conflict with the position taken by the district and circuit court in determining which class members should be eligible for back-pay. However, a careful reading of those opinions reveal that they are not in conflict. Neither the sixth circuit in *Thornton* or the fourth circuit in *Hairston* held that the district court must hear testimony from each and every class member about why they did not make a "pre-litigation" inquiry about a road job. What they did hold is that a showing of a "pre-

17. Sea, *Franks v. Bowman Transportation Co., supra,* n. 41.

18. Respondents have consistently urged that "front-pay" is also a necessary ingredient to the "make whole" mandate of Congress and the Courts. Petition for Certiorari, p. A-36.

19. 6th Cir: *Thornton v. East Texas Motor Freight,* 497 F.2d 416 (1974); 4th Cir: *Hairston v. McLean Trucking Co.,* 520 F.2d 226 (1975).

litigation" inquiry or an explanation why such an inquiry was not made from each class member, *may* be a matter which the district court, in its discretion should consider.[20]

For this reason, respondents submit that there is no true conflict in the circuits on this issue, and, in fact, a common thread binds all of the circuit opinion and that is, that the district court must be given broad discretion in determining how much significance should be attached to this factor. As the record in this case reveals, the district court properly exercised its discretion in not allowing the absence of a "pre-litigation" inquiry to operate[21] to diminish or

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20. The fourth, fifth and sixth circuits have all recognized the problem; and have dealt with it in a strikingly similar manner. That is, that the district court must be given wide latitude in determining the weight which should be given to the absence of a "pre-litigation" inquiry by any individual discriminatee. This conclusion is bottomed on a judicial recognition that the evidence may well establish the futility of inquiry; See, *Hairston, supra.;* or it may establish that such an inquiry would not have been futile. See, *Thornton, supra.* Of course, where the evidence clearly shows that it would not have been a futile gesture, then a showing of a pre-litigation inquiry might be relevant. However, the petitioner made no such showing here and the record supports the district court's position that such an inquiry did not need to be made of each class member; nor should back-pay be conditioned upon a showing of a pre-litigation inquiry. And, in this case, the court of appeals correctly recognized that the district court must be given "wide discretion" in determining whether lack of a showing of a pre-litigation inquiry should be utilized in determining the eligibility of individual class members for back-pay. See, Petition for Certiorari, p. A-32, n. 13.

21. We note that petitioner asserts that the lower court did not follow the guidelines of this court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) by not requiring that an "application" be made for the job in question. This position is absurd for two reasons. First, this Court's pronouncement in *McDonnell Douglas* related only to the establishment of a prima facie case of discrimination; and, second, this Court expressly recognized that these criteria were not "necessarily applicable in every respect to different factual situations" *McDonnell Douglas,* supra at 802, n. 13. Obviously, the record in this case mandates that this criteria, if it literally applies in all back-pay situations, be modified.

otherwise affect the individual discriminatee's back-pay entitlement.

4

The Formula Approved By the Court Below For the Back-Pay Due Class Member Is Valid

"The foregoing explanations may be somewhat tedious."[22]

The Petitioner's attacks on the computation of back-pay are little more than circuitry calculated to confound this Court.

Petitioners refers the Court to the trial court's exhibit 1[23] and suggests that the exhibit demonstrates that a class member, Edgar Williams, would have earned less money as a road driver in his rightful place than a city driver. The suggestion is chicanery and untrue.

It is now well settled that, absent special or unusual cirstances, back-pay[24] and seniority relief[25] are appropriate remedies to effectuate the central purpose of the Act. The niceties of fashioning back-pay and seniority relief appropriate to the circumstances of each case are properly within the discretion of the trial court who is seized with a "keen appreciation" of the peculiar facts and circumstances of the case.[26]

From October 30, 1973, to November 9, 1973, virtually all of the testimony concerned the fashioning of appropriate

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22. Petition for Certiorari, p. 35.

23. Petition for Certiorari, p. A-100.

24. *Albemarle Paper Co. v. Moody, supra.*

25. *Franks v. Bowman Transportation Co., supra.*

26. *Albemarle Paper Co. v. Moody, supra* at 421-422.

relief to remedy the discrimination which had been established in the earlier, liability phase of the trial. The respondent's expert, Dr. Tapia, testified that there were four or five formulae by which back pay could be computed.[27] Drs. Lawless and Otto proposed other methods, and variations on Dr. Tapia's methods. The trial court, in its wisdom, chose to fashion a method of computation which adopted the best of the various methods, and addressed the various challenges raised by counsel for both petitioner and respondents. This Court should not disturb the circuit court's affirmance of the district court, whose opinion was based upon an intimate acquaintance with the nuances and subtleties of the facts and circumstances of this case.

CONCLUSION

Petitioner does not bring before this Court a substantial question of law, nor a question of law at all; rather they attempt, for the third time, to reargue facts which are not supported by the record.

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of any other court of appeals on the same matter.

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27. Tr. II. R. 654.

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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